TAHAN STEEL CORPORATION SDN BHD

v.

BANK ISLAM MALAYSIA BHD (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: D4-22A-48-2003]
23 FEBRUARY 2004

CIVIL PROCEDURE: *Injunction - Erinford injunction - Application for Erinford injunction pending hearing of appeal - Damages - Balance of convenience - Whether appeal would be rendered nugatory if injunction not granted*

This was an application by the plaintiff for an *Erinford* injunction restraining the defendant from enforcing certain security documents executed in tandem with an Al-Istisnaa' facility agreement against the plaintiff until the hearing and final disposal of the plaintiff's appeal to the Court of Appeal. The main issue requiring consideration was whether the appeal to the Court of Appeal, if successful, would be rendered nugatory if the *Erinford* injunction was not granted.

Held (dismissing the plaintiff's application):

[1] On the facts, damages would an appropriate and suitable remedy for the plaintiff as the plaintiff's claim was entirely monetary in nature. Furthermore, as a financial institution operating under Islamic banking principles, the defendant would be made to suffer loss of use of its money by the delay in recovering monies from the plaintiff in the event that this court ultimately decided that the injunction should have been granted. The courts could not compensate such a financial loss since the defendant was prevented by its strict adherence to Islamic banking principles from taking any penalty interest which would be in the nature of usury. The balance of convenience thus lay in favour of the defendant and, hence, an *Erinford* injunction was not suitable to the facts of the present case. (pp 136 b, h & 137 b)

Case(s) referred to:

Cocoa Processors Sdn Bhd v. United Malayan Banking Corporation Bhd & Ors (No 2) [1989] 1 CLJ 183; [1989] 1 CLJ 436 HC ***(refd)***

Erinford Properties Ltd v. Cheshire County Council [1974] 2 All ER 448 ***(foll)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah Abu Samah & Ors [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244 SC ***(refd)***

Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd & Ors [2004] EWCA CIV 19 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 43

For the plaintiff - Gananathan Pathmanathan (Olivia Loh Yuet Ling); M/s Bodipalar Ponnudurai Nathan

For the defendant - Md Tajuddin Md Isa (Rosemmawati Hussein); M/s Md Tajuddin & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

The plaintiff's injunction application in encl. 2 was dismissed with costs by me on 9 February 2004 and the plaintiff has since filed an appeal to the Court of Appeal on 10 February 2004. I have since written my judgment in regard to encl. 2 and I will refer to this judgment as the "first judgment". By way of encl. 14, the plaintiff applies, which is in the nature of an Erinford application, for a limited injunction until the hearing and final disposal of the appeal to the Court of Appeal and that application seeks to restrain the defendant from acting on, placing reliance or enforcing the security documents as alluded to in the first judgment as against the plaintiff which were executed in tandem with the Al-Istisnaa' facility agreements. This is an application for a limited injunction and it is in the nature of what is now commonly known as an Erinford injunction pending the appeal to the Court of Appeal.

The Law

It goes without saying that I have the jurisdiction to grant a limited injunction pending appeal to the Court of Appeal or an injunction in the nature of an Erinford order. The jurisdiction that is vested in me arises from the power of the High Court to entertain an application in order to ensure that the appeal to the Court of Appeal is not rendered nugatory. That jurisdiction can be seen in s. 43 of the Courts of Judicature Act 1964 (Act 91) which states as follows:

43. Applications.

Wherever application may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court.

This would be followed, still on the point of jurisdiction, by the case of *Erinford Properties Ltd v. Cheshire County Council* [1974] 2 All ER 448. I need go no further than to reproduce the headnote of that case and I shall do so now (see p. 448 of the report):

Where a judge dismisses an interlocutory motion for an injunction he has jurisdiction to grant the unsuccessful applicant an injunction pending an appeal against the dismissal; it is not necessary for the applicant to apply to the Court of Appeal (see p. 453 a b and d, post).

There is no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal's decision from being rendered nugatory should that court reverse the judge's decision (see p. 454 a b d e and f, post).

This means that notwithstanding that I had refused the plaintiff's injunction application in encl. 2, I could still grant the plaintiff's application for an *Erinford* injunction as sought for in encl. 14. Another case worth citing would be the case of *Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 CLJ 31; [1988] 1 CLJ (Rep) 244, a decision of Syed Agil Barakbah SCJ (as he then was) and in the course of delivering the judgment of the then Supreme Court, his Lordship said:

Turning to the main issue, the learned judge, in granting the order suspending the *ex parte* injunction, applied the principle based on English authorities. He quoted a passage by Plowman J in *London Permanent Benefit Building Society v. de Baer* [1969] 1 Ch. 321 at 332 from the judgment of Cotton LJ in *Polini v. Gray* [1879] 12 Ch. D 438. The principle, *inter alia*, says that where there is a reasonable ground of appeal and if not making the order to stay execution of the decree would render the appeal nugatory, ie, it would deprive the appellant, if successful, of the result of the appeal, then it becomes the duty of the court to interfere and suspend the right of the successful party. That, in the view of Cotton LJ, applied equally to the case where action has been dismissed and to the case where a decree has been made establishing the plaintiff's title. He also cited *Erinford Properties Ltd. v. Cheshire County Council* [1974] 2 All ER 448 where Megarry J applied the dictum in *Polini v. Gray* [1879] 12 Ch. D 438 and held that a judge who dismissed an interlocutory motion for injunction has jurisdiction to grant the unsuccessful applicant an injunction pending appeal against such dismissal in order to prevent the Court of Appeal's decision from being rendered nugatory should it reverse the judge's decision.

So it can be surmised that different considerations would apply in the grant or refusal of the *Erinford* application in encl. 14 from the considerations that would have formed the basis of the dismissal of the injunction application in encl. 2. The main consideration in the *Erinford* injunction in encl. 14 is this. That the appeal to the Court of Appeal is not rendered nugatory in the event the plaintiff is successful. Megarry J, in the *Erinford Properties (supra)*, stated the law in this refined language (see p. 454 of the report):

> I can see no real inconsistency in any of these cases. The questions that have to be decided on the two occasions are quite different. Putting it shortly, on a motion the question is whether the applicant has made out a sufficient case to have the respondent restrained pending the trial. On the trial, the question is whether the plaintiff has sufficiently proved his case. On the other hand, where the application is for an injunction pending an appeal, the question is whether the judgment that has been given is one on which the successful party ought to be free to act despite the pendency of an appeal. One of the important factors in making such a decision, of course, is the possibility that the judgment may be reversed or varied. Judges must decide cases even if they are hesitant in their conclusions; and at the other extreme a judge may be very clear in his conclusions and yet on appeal be held to be wrong. No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the *status quo* pending the appeal. I cannot see that a decision that no injunction should be granted pending the trial is inconsistent, either logically or otherwise, with holding that an injunction should be granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending the trial the judge becomes *functus officio quo* ad granting any injunction at all.

And I gratefully adopt them in adjudicating encl. 14.

Adjudicating encl. 14

I need to refer to yet another part of Megarry J's decision in the *Erinford Properties (supra)*. At p. 454 of the report, Megarry J aptly said:

> There may, of course, be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. But subject to that, the principle is to be found in the leading judgment of Cotton LJ in *Wilson v. Church (No 2)* [1879] 12 Ch D at 458, where, speaking of an appeal from the Court of Appeal to the House of Lords, he said, 'when a party is appealing, exercising his undoubted right of appeal,

> this Court ought to see that the appeal, if successful, is not nugatory'. That was the principle which Pennycuick J applied in the *Orion* case [1962] 3 All ER 466, [1962] I WLR 1085; and although the cases had not then been cited to me, it was on that principle, and not because I felt any real doubts about my judgment on the motion, that I granted counsel for the plaintiffs the limited injunction pending appeal that he sought. This is not a case in which damages seem to me to be a suitable alternative.

Mohamed Dzaiddin J (as he then was) in *Cocoa Processors Sdn Bhd v. United Malayan Banking Corporation Bhd & Ors (No: 2)* [1989] 1 CLJ 183; [1989] 1 CLJ (Rep) 436 vigorously applied *Erinford Properties (supra)* in his judgment.

> Megarry J in *Erinford* [1974] 2 All ER 448 recognized that one of the factors in granting the application was the possibility that the judgment might be reversed or varied. I agree that this is an important factor in favour of the plaintiff. On the other hand, there are other considerations, eg 'where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on'. Therefore, considering the submissions of counsel from the point of view of the *Erinford* [1974] 2 All ER 448 principles, I find merits in the defendants' objection. Having considered the whole position of the case, I am of the view that whether or not the plaintiff succeeds in the appeal and in the main action will not be affected by its failure to obtain this further interim injunction. It must be remembered that the plaintiff's claim against the defendants is for damages for wrongful appointment of receivers and managers. The first and second defendants, being a commercial and merchant bank respectively, will no doubt satisfy any money judgment ordered by the court.

Now, in dismissing the plaintiff's application in encl. 2, I have vigorously applied the case of *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 in particular the three tests enunciated by the Court of Appeal. A reading of the first judgment would bear this out. That first judgment is rather protracted and there I have considered all the major issues ventilated by the parties. In the *Erinford Properties (supra)*, damages was not a suitable alternative (see p. 454 at line "F" of the report), while in the *Cocoa Processors Sdn Bhd (supra)*, the plaintiff's claim there against the defendants there was for damages (see p. 498 right hand column at line "B"). Two specific questions must be advanced in adjudicating encl. 14 and they are:

(1) whether the appeal to the Court of Appeal would be rendered nugatory if the *Erinford* injunction is not granted?; and

(2) where does the balance of convenience rest? (see *Cocoa Plantations Sdn Bhd (supra)* at p. 498 of the report at line "D" of the second paragraph).

In regard to the first question, I am of the considered view that the plaintiff's application in encl. 14 for an *Erinford* injunction pending appeal to the Court of Appeal should be dismissed forthwith for the following reasons:

(1) It is apparent that the plaintiff's claim is founded on damages. The plaintiff is only interested in obtaining damages. The true claim of the plaintiff is found in the amended statement of claim in encl. 6 particularly prayers (4) and (5) thereof and they are entirely monetary claims. Thus, damages would be an adequate remedy.

(2) It is the plaintiff's contention that the plaintiff's company is in a healthy financial position. This contention is a contradiction in terms. By the plaintiff's own admission, the plaintiff's company is a "single purpose vehicle" incorporated for the sole purpose of developing and constructing a Steckel Hot Strip Mill Plant to produce Hot Rolled Coils ("the said project"). If it is true as contended by the plaintiff that it has suffered much damage and will not be able to carry out the said project when the defendant refused to release the balance of the Al-Istisnaa' facility amounting to RM38,784,015.16 million, then it is crystal clear that the plaintiff's company will be unable to repay the whole of the facility amount. Basically, it boils down to dollars and cents.

(3) The land that has been charged to the defendant and forms the main security is valued at RM128 million and it is insufficient to settle the outstanding sale price. Even the defendant's counterclaim is far bigger in quantum; it is for RM143,590,488.09.

(4) For want of repetition, the primary consideration in this matter is in regard to the adequacy of damages. As a self proclaimed single purpose vehicle, the sole objective of the plaintiff is to gain profit. Thus, damages would be the appropriate remedy for the plaintiff and there can be no other consideration.

(5) There is no prior reputation for the plaintiff to speak of. The reputation of the shareholders or that of the parent company is not an issue here since they are not parties to the present litigation before me.

In the context of the balance of convenience which is the second question to examine, I must take cognizance of the fact that the underlying transaction between the plaintiff and the defendant is one of financing under the Syariah principles. It must be borne in mind that the defendant has not been paid the agreed instalments from 31 January 2002. An *Erinford* injunction will further impede the ability of the defendant to obtain further sums from the plaintiff pending the appeal to the Court of Appeal. As a financial institution operating

under the Islamic banking principles, the defendant would be made to suffer loss of use of its money by the delay in recovering monies from the plaintiff in the event that this court ultimately decides that the injunction should have been granted. This financial loss cannot be compensated by the courts since the defendant is prevented by its strict adherence to Islamic banking principles from taking any penalty interest which would be in the nature of usury. The sum total of it all would be this. That the balance of convenience lies in favour of the defendant and the *Erinford* injunction sought for in encl. 14 should be dismissed with costs.

Lest I be accused of an oversight, I must now briefly allude to the plaintiff's arguments. It is submitted on behalf of the plaintiff that if the land is sold, the plaintiff's appeal to the Court of Appeal would be rendered nugatory. With respect, there is no merit in this argument. I did say in the first judgment that the land in question is a commercial land and it carries with it no sentimental or peculiar value. In the event this court ultimately decides this case in favour of the plaintiff and that the land should not have been sold off, then damages would be an adequate remedy for the plaintiff.

The plaintiff urges this court to be on its side and argues that it would suffer reputational loss. Again, with respect, there is no substance to this argument. It must be recalled that the plaintiff had admitted that they are a single purpose vehicle solely incorporated for the said project. As I see it, the plaintiff's reputation is pegged to the said project and nothing else. So, the plaintiff has yet to acquire any substantial reputation for it to lose.

Finally, the plaintiff's argument that the enforcement of the security documents as alluded to in the first judgment would enable the defendant to wrongfully claim the total sale price. Again there is no merit in this argument. If the plaintiff's contention is right, then the appropriate remedy would be damages. In the final analysis, damages would be an adequate compensation in terms of dollars and cents.

Proceeding ahead, I must now take stock of the situation.

It must be recalled that the defendant in this suit herein have counterclaimed for the sum of RM143,590,488.09 which is said to be due and owing under the Al-Istisnaa' facility agreements, of which the Al-Istisnaa' sale agreement is one of them. This debt is still subject to determination at the full trial. Likewise, the plaintiff's claim for declarations, permanent injunctions and damages in respect of the breach and termination of the Al-Istisnaa' facility agreements and the security documents is also equally subject to determination at the full trial. I take note that the most compelling effect of my decision in regard to encl. 14 would be that the defendant in all likelihood will enforce

the security documents as against the plaintiff without first obtaining judgment in their counterclaim in the action herein. But this compelling effect must be weighed as against the inability of the defendant to seek any penalty interest which is forbidden under the Islamic banking principles. It must not be forgotten that the defendant provides an "interest free banking scheme" and the taking of penalty interest is labelled as usury and is forbidden. The English Court of Appeal with a coram of Potter, Laws and Arden LJJ had occasion to consider Islamic law in the context of the various financing agreements in the case of *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd and Others* [2004] EWCA CIV 19, [2004] All ER (D) 280 (Jan) (Approved Judgment) (the website source would be: Legal > Legal (excluding U.S.) > Commonwealth > Case Law > England and Wales Reported and Unreported Cases). Potter LJ delivered the decision of the Court of Appeal in the Shamil Bank with Laws and Arden LJJ agreeing. I have referred to the case of Shamil Bank in the first judgment. Without a doubt, Shamil Bank has raised a few eyebrows and it is hoped that our apex court would have a chance to render a critical analysis of that case. Shamil Bank was concerned with the all pervading conflict of laws between the principles of English law and Islamic law. That was a case where the bank entered into an Islamic financing agreements with the defendants there. The governing law clause provided for English law subject to the principles of Islamic law. The defendants there defaulted on the agreements and the bank commenced proceedings. The issue which the English Court of Appeal had to consider was whether the obligations under the financing agreements were unenforceable unless enforceable under both the Islamic law and the English law. In his judgment, Potter LJ made references to the Qur'an and the Sunnah and this was what his Lordship said:

Introduction

1. This is an appeal from the judgment of Mr Justice Morison dated 1 August 2003 whereby he gave summary judgment in favour of the claimant Shamil Bank of Bahrain EC ('the bank') against the first and second defendants as principal debtors in respect of monies advanced to them by the Bank under various financing agreements and against the third, fourth and fifth defendants as guarantors of certain of those agreements. The total judgment sum awarded was some US $49.7 million. The appellants were refused permission to appeal by Morison J, but permission was granted by Clarke LJ on 17 September 2003 in relation to a single issue relating to the construction and effect of the form of the governing law clause contained in the financing agreements. That clause reads as follows:

> Subject to the principles of the Glorious Sharia'a, this Agreement shall be governed by and construed in accordance with the laws of England.

2. It is not in dispute that 'the principles of the Glorious Sharia'a' referred to are the principles described by the defendants' expert, Mr Justice (retd) Khalil-Ur-Rehmam Khan as:

> the law laid down by the Qur'an, which is the holy book of Islam, and the Sunnah (the sayings, teachings and actions of Prophet Mohammad (pbuh)). These are the principal sources of the Sharia. The Sunnah is the most important source of the Islamic faith after the Qur'an and refers essentially to the Prophet's example as indicated by the practice of the faith. The only way to know the Sunnah is through the collection of Ahadith, which consists of reports about the sayings, deeds and reactions of the Prophet …

3. One principle expressly stated in the Qur'an and Sunnah is that the charging of interest upon a loan, in whatever form, is 'Riba' and is contrary to the Sharia. At Sura II, 275-79 of the Qur'an it is stated that:

> ... Allah has made buying and selling lawful and has made the taking of interest unlawful. Remember, therefore, that he who desists because of the admonition that has come to him from his Lord, may retain what he has received in the past; and his affair is committed to Allah. But those who revert to the practice, they are the inmates of the fire; therein shall they abide. … O Ye who believe, be mindful of your duty to Allah and relinquish your claim to what remains of interest, if you are truly believers. But if you do not, then beware of war from the side of Allah and his Messenger. If, however, you desist, you will still have your capital sums; thus you will commit no wrong, nor suffer any wrong yourself.

Sura III 130 states that:

> O Ye who believe, devour not interest, for it goes on multiplying itself; and be mindful of your obligation to Allah that you may prosper.': The Quran, translated by Muhammad Zafrulla Khan, Curzon Press, 1971.

Likewise here, the Al-Istisnaa' facility agreements bring to the forefront the same principles in the Qur'an and the Sunnah.

I also take note that out of the security documents as alluded to in the first judgment, of greatest concern to the plaintiff is the deed of assignment created over the land as security. The land in question is the very plot earmarked by the plaintiff for the purposes of implementing and completing the said project. The deed of assignment was created as an interim security pending execution of a separate National Land Code charge over the land in favour of the defendant when a separate title for the land would be issued. The deed of

assignment is for all intents and purposes a security for payment to the defendant of any indebtedness by the plaintiff. And under the power of attorney granted pursuant to the deed of assignment, the defendant is free to take immediate steps to sell the land and recover the proceeds without even having to comply with the provisions normally required under an order for sale under the National Land Code. Aside from the deed of assignment, the defendant in all likelihood will also act upon, rely or enforce the debentures by appointing receivers and managers over the plaintiff not to mention calling upon corporate and directors guarantee, shareholders undertaking, performance bonds and other insurances without obtaining judgment in their counterclaim. All these points have been taken into consideration in adjudicating encl. 14. It all boils down to money and money is something which the defendant can certainly afford. It is a commodity that will definitely be affordable to the defendant, in the event that I err in deciding encl. 14, bearing in mind that it is a financial institution standing on firm footing in this country. If the land is sold, damages would be the appropriate compensation for the plaintiff. If the defendant seeks to enforce the debentures and to call upon the corporate and directors guarantee as well as shareholders undertaking together with the performance bonds and other insurances, that will be the prerogatives of the defendant. As a successful litigant in so far as encls. 2 and 14 are concerned, the defendant should not be deprived of the fruits of its litigation. Damages would be the most suitable and adequate remedy for the plaintiff.

Conclusion

An *Erinford* injunction is not suitable to the facts of the present case because damages would be an adequate compensation for the plaintiff. The balance of justice lies in favour of the defendant bank. I must dismiss encl. 14 with costs.